No. 17-71

In the
Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CALIFORNIA BUSINESS PROPERTIES ASSOCIATION, CALIFORNIA FORESTRY ASSOCIATION, AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER WEYERHAEUSER COMPANY AND RESPONDENTS MARKLE INTERESTS, LLC, ET AL.

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QUESTION PRESENTED

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

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IDENTITIES AND INTERESTS OF AMICI CURIAE

Building Industry Legal Defense Foundation, California Cattlemen's Association, California Business Properties Association, California Forestry Association, and California Chamber of Commerce submit this brief *amicus curiae* in support of Petitioner Weyerhaeuser Company and Respondents Markle Interests, LLC, et al.[1]

The Building Industry Legal Defense Foundation ("BILD") is a non-profit mutual benefit corporation and a subsidiary of the Building Industry Association of Southern California, Inc. ("BIASC"). BIASC represents approximately 1,200 member companies across Southern California that are active in all aspects of the building industry, including land developers; builders of housing, commercial, and infrastructure; and architects, engineers, planners, contractors, and suppliers. The purposes of BILD are, in part, to initiate or support litigation or agency action designed to improve the business climate for the building industry and to monitor government regulation critical to the industry.

California Cattlemen's Association is the preeminent organization of cattle grazers in

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[1] The parties have filed a blank consent to the filing of *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

California, and acting in conjunction with its affiliated local organizations, it endeavors to promote and defend the interest of the livestock industry. Formed in 1917 as a non-profit trade association, the Cattlemen's Association promotes the interests of ranchers both large and small in California. Beef cattle producers operate on over 38 million of California's 100 million acres. The Cattlemen's Association has 35 local cattlemen's association affiliates that serve as a strong link between the grassroots membership and the association. The Cattlemen's Association represents its members' interests before the California State Legislature, Congress, and federal and state regulatory agencies on a wide range of issues including federal lands grazing fees and regulation, wetlands, conservation programs, air quality, wildlife management, parcel fees, and other issues affecting the use and ownership of California's rangelands.

California Business Properties Association ("CBPA") is a commercial real estate trade association that serves as the legislative and regulatory advocate for property owners, tenants, developers, retailers, contractors, land-use attorneys, brokers, and other professionals in the commercial real estate industry. With over 10,000 members, CBPA is the largest consortium of commercial real estate professionals in California. Its members range from some of America's largest retailers and commercial property owners and tenants, to individual and family-run commercial real estate interests.

California Forestry Association is a nonprofit, nonpartisan organization dedicated to sustainable

uses of renewable resources and responsible forestry. Association membership includes forest land owners, forestry professionals, loggers, manufacturers, wholesalers, and retailers who are engaged in the production and distribution of wood products. These members own 3.8 million of the 7.4 million acres of private forest land in California and are committed to protecting and enhancing the natural life cycle of California's forests. They also supply wood resources by contracting to purchase and harvest significant amounts of timber from public lands, including the national forests.

The California Chamber of Commerce ("CalChamber") is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before federal and state courts by filing amicus curiae briefs and letters in cases, like this one, involving issues of paramount concern to the business community.

Amici represent a broad cross-section of those individuals and businesses who own, lease, and make productive use of private lands in California. As a consequence, they are deeply concerned about the proper scope of the power of the United States Fish

and Wildlife Service ("FWS" or "Service") under the Endangered Species Act to designate private property as "critical habitat" for protected species. If, as the Fifth Circuit Court of Appeals in this case held, the FWS has the authority to impose a "critical habitat" designation even on property that is not habitat for any protected species—and is not even suitable for that purpose— then Amici's members face increasing regulatory burdens on and uncertainty over their ability to use and develop their properties.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Endangered Species Act ("ESA") requires the FWS[2] to identify and list endangered and threatened animals and plants. 16 U.S.C. § 1533(a)(1). The listing of an animal species triggers the Service's statutory obligation to designate "critical habitat" for that species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A)(i). In this case, a panel of the Fifth Circuit upheld the Service's designation of private land in Louisiana as "critical habitat" for a listed species despite the fact

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[2] The United States Department of Interior's FWS and the United States Commerce Department's National Marine Fisheries Service ("NMFS") both administer the ESA. The FWS has primary responsibility for terrestrial and freshwater wildlife, like the Dusky Gopher Frog here, while NMFS has jurisdiction over marine wildlife. For simplicity's sake, this brief refers only to FWS given that the case involves a species within its jurisdiction, but the same principles discussed herein apply to NMFS.

that the land is uninhabited—and uninhabitable—by that species.

All of the known Dusky Gopher Frogs live in Mississippi more than 50 miles away from the Louisiana land at issue. *See* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. 35118, 35146 (June 12, 2012) (showing map of critical habitats). The Service could not relocate the frogs onto the Louisiana land without the landowner's consent, *see id.* at 35,123, and the landowners have consistently explained that they do not and will not consent. *See Markle Interests, L.L.C. v. United States Fish & Wildlife Serv.*, Case No. 14-31008, Doc. 00512856810, Joint Brief of the Appellants at 7 n.2 (quoting public comments). Further, if the frogs somehow ended up on the Louisiana land as it exists today, they would die. *See* Final Rule, 77 Fed. Reg. at 35,129. Nonetheless, the Louisiana land was designated as "essential" to the species' conservation, imposing substantial costs on the landowners—$34 million by the Service's calculation—and creating a precedent that puts virtually all United States land at risk of designation. *See* 77 Fed. Reg. 35118, 35141; *Markle Interests, L.L.C. v. United States Fish & Wildlife Serv.*, 848 F.3d 635, 637 (5th Cir. 2017) (Jones, J., dissenting from denial of rehearing en banc).

Drawing partly on the California experience, the first and second parts of this brief describe the impacts on landowners and consumers that will result from a federal power to designate *non-habitat* as "critical habitat" for protected species. The Service routinely assures private landowners that

designations of their property as "critical habitat" do not affect their land ownership or establish a refuge, wilderness, reserve, preserve or other conservation area. *See, e.g.*, United States Fish and Wildlife Service, *Critical Habitat under the Endangered Species Act* (June 13th, 2017) https://www.fws.gov/southeast/endangered-species-act/critical-habitat/. It emphasizes that such designations do not allow the federal government or the public to access their lands, and do not result (at least automatically) in closure of the designated area to private use and development. *Id.* At worst, the Service claims, a "critical habitat" designation affects only projects on private lands requiring federal action that may adversely modify the designated critical habitat, *e.g.*, projects requiring a federal permit, a federal license, or federal funding. *Id.* In that case, the federal agency undertaking the action must consult with the Service to avoid jeopardizing the existence of listed species and their critical habitat.[3]

The Service's narrative masks the harsh reality faced by developers, businesses, ranchers, foresters and others with a "critical habitat" designation on their land. First, as federal permitting jurisdiction has expanded over the last several decades, so too have the circumstances under which federal agencies need to consult with the Service to ensure that use

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[3] According to the Service's representations at oral argument before the Fifth Circuit, there is virtually no effect on the land *until* the landowner receives a determination by the Service or the U.S. Army Corps of Engineers that a proposed development qualifies as an "adverse modification." And at that point, the Service offered, the landowner could challenge the adverse modification determination.

and development of the property are limited to avoid adverse modification to any critical habitat. And second, the designation itself is costly in terms of additional permitting impediments and decreased land value. Those are on top of the costs of the consultation process itself. *See* Lawrence R. Liebesman & Rafe Petersen, *Federal Agency Consultation and Recovery Planning Under The Endangered Species Act*, SL091 ALI-ABA 327, 333 (June 2006) ("The consultation process can be lengthy and complex with extensive negotiations between a project applicant, the Corps and the FWS.").

The third part of this brief discusses how federal designations of non-habitat are both duplicative of and inimical to state and local efforts, and private initiatives, to conserve species. "Regulation of land use" is "a quintessential state and local power." *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality). With the discretion to designate even *non-habitable* land as "critical habitat," the Service's power and influence over private property in the United States will rise to an unprecedented level—far beyond what Congress contemplated or the Constitution permits. Indeed, nowhere does the ESA contain the "clear and manifest statement from Congress" that is expected when statutes authorize an "unprecedented intrusion" into an area of "traditional state authority" such as land-use regulation. *Id.* (internal quotation and citation omitted). California is a case in point. With the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 (West 2018) ("CEQA"), the California Coastal Act, Cal. Pub. Res. Code § 30000 (West 2018) ("CCA"), the California Endangered Species Act, Cal. Fish & Game Code

§ 2050 (West 2018) ("CESA"), and a potpourri of other environmental statutes, California—and many other states like it—are well-equipped to balance important economic interests (such as the need to address the critical shortage of housing), and the state's interest in protecting threatened and endangered animals on private lands.

What's more, the private sector has begun supporting conservation initiatives in new and more significant ways. *See, e.g.*, Laura Huggins, *Contracting for Conservation*, Property and Environment Research Center (Sept. 14, 2017), https://www.perc.org/2017/09/14/contracting-for-conservation/. Private entities that historically may have resisted conservation efforts are now aligned with those efforts. Affirming the Service's unlimited "designation" power threatens to reverse the organic trend of state, local and private efforts to deal with quintessentially local concerns.

Finally, given its limited resources, the Service can barely pursue its statutory priorities. Indeed, as the countless lawsuits against it over the years show, the Service finds it challenging even to meet the most basic deadlines for completing "status reviews" of listed species every five years and other obligations. Candee Wilde, Note, *Evaluating the Endangered Species Act: Trends in Mega-Petitioners, Judicial Review, and Budget Constraints Reveal a Costly Dilemma for Species Conservation*, 25 Villanova Envtl. L.J. 307, 321-23 (Jan. 1, 2014). The last thing the Service needs is the power to pursue low-priority objectives—like searching for, and designating as "critical habitat," land that does not host and is

inhospitable to any protected species. Such new power can be expected to create a new cottage industry of litigation against the Service, thereby further undermining the agency's more important priorities.

For all these reasons, the Fifth Circuit's decision should be reversed, and the Service's power limited to designating *actual* habitat that is critical to a listed species.

ARGUMENT

I. DESIGNATIONS OF ACTUAL HABITAT ALREADY IMPOSE SUBSTANTIAL RISKS AND COSTS ON SOCIETY AS A WHOLE; RAMPANT DESIGNATIONS OF *NON-HABITAT* WOULD DRAMATICALLY WORSEN THOSE RISKS AND COSTS

As alluded to above, the Service's designation of land as "critical habitat" is legally consequential. Section 7 of the ESA requires that federal agencies ensure that their "actions" are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). "Actions" are defined as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas," and include "the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." 50 C.F.R. § 402.02. Thus, the range of federal actions that can trigger consultation is extraordinarily broad.

Under Section 7, federal agencies must consult with the Service on any actions that may affect listed

species and their habitats to ensure that reasonable and prudent measures will be undertaken to mitigate impacts on listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14; *see also Bennett v. Spear*, 520 U.S. 154, 158 (1997). Consultation with the Service can be either formal or informal depending on the likelihood of the action to adversely affect listed species or critical habitat. 50 C.F.R. §§ 402.13, 402.14. Once a formal consultation is initiated, the Service will issue a Biological Opinion (either a "no jeopardy" or a "jeopardy" opinion) indicating whether the proposed agency action will jeopardize the continued existence of a listed species or result in the destruction or modification of its critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g). Importantly, a permit will not be issued for a project with a "jeopardy" opinion unless it is redesigned to lessen impacts; needless to say, "biological opinions under Section 7 have the power to stop development projects in their tracks and have sometimes done so." Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 141 (2004); *see, e.g., Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (ruling that the almost-constructed Tellico Dam, the completion of which (it was thought[4]) would

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[4] Subsequent to the Court's decision, "several small relict populations" of snail darter were discovered in other streams. *See* Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 Envtl. L. 1, 8 n.22 (2002). In 1984, the Service downlisted the fish to threatened status and rescinded its critical habitat. *See* 49 Fed. Reg. 27,510 (July 5, 1984).

eradicate the endangered snail darter (a small freshwater fish), could not proceed).

If landowners hardly ever needed federal authorization or funding for projects proposed on their properties, critical habitat designations might be considered relatively inconsequential from a legal and economic standpoint. But that is not the case. Increasingly, landowners have witnessed ever-greater involvement by federal agencies in land use and development. "As federal regulatory programs have expanded, an increasing number of non-federal activities require some sort of federal permit or approval, or some other federal nexus that triggers Section 7(a)(2) and the duty to avoid the adverse modification of critical habitat." Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 34 UCLA J. Envtl. L. & Pol'y 1, 6 (2016).

Nowhere has the expansion of federal regulatory programs been more pronounced than in the area of federal permitting of projects under the Clean Water Act. As one commentator has noted, "[t]he most likely source of a federal nexus for a private development project is Section 404 of the Clean Water Act, which requires private parties to obtain permits from the Army Corps of Engineers before conducting dredging or filling activities in the "waters of the United States," including wetlands, rivers, creeks, and streams. Sinden, *supra*, at 177 n.216 (citing 33 U.S.C. § 1344; 33 C.F.R. § 328.3(a)). But, as this Court is well aware, "[t]he reach of the Clean Water Act is notoriously unclear." *Sackett v.*

Environmental Protection Agency, 566 U.S. 120, 132 (2012). Faced with that statutory ambiguity, the federal agencies charged with the Act's implementation and enforcement—the Army Corps of Engineers and the Environmental Protection Agency—have pushed their federal permit jurisdiction to the limit (and, arguably, beyond). Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, 2012 Cato Sup. Ct. Rev. 139, 142-49 (2012) (tracing the expansion of federal regulatory jurisdiction under the Clean Water Act over the last four decades).

The upshot is that landowners risk having the federal government control the extent to which they can use and develop their properties. Federal regulatory programs, like the Clean Water Act, are expanding. And if the Fifth Circuit's decision stands, federal "critical habitat" designations will proliferate across the country—if not on the Service's own initiative, then certainly with the prodding of third-party environmentalist lawsuits demanding prophylactic designations of hypothetical habitat as a means of undermining productive use of property.

The market recognizes the cost of that risk as early as the proposal stage. According to a study funded by the Service itself, when the Service proposes to designate undeveloped land as critical habitat by publishing its property map, the price per acre of that land decreases by an average of 20 percent. *See* Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. Reg'l Sci. 67, 73 (2006)

(noting this particular finding had a *p* value of only 0.091). That same study found that the supply of single-family residential housing permits decreases markedly when critical habitat is proposed—by 23.5 percent in the short run and 37.0 percent in the long run. *See id.* at 93.

"The results indicate the proposal of [critical habitat] acts as a signal that all development in the [municipality] will be more costly." *Id.* at 68. The results are "consistent with anecdotal evidence that cities where [critical habitat] has been designated tend to become more risk averse and hence more stringent in issuing new building permits *regardless of whether or not they are for land in [critical habitat]-designated areas.*" *Id.* at 94 (emphasis added). The study focused on residential construction permits, but there is little reason to believe the effects are limited to that particular land use. And even the Service recognizes that critical habitat designations have significant ramifications on property valuation; its own economic analysis determined the Louisiana landowners burdened in this case will lose up to $34 million in development opportunities if the designation remains in place. 77 Fed. Reg. 35118, 35141.

Finally, upholding the Service's power to designate non-habitat will harm the average consumer of the goods and services that are the product of land uses: housing, commercial space, locally produced food, and other basic goods and services that are made possible only through the productive use of land. *See, e.g.*, Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of*

Critical Habitat Designation: A Comment on Critical Habitat and the Challenge of Regulating Small Harms, 43 Envtl. L. Rep. News & Analysis 10678, 10678 (2013) ("The designation of critical habitat under the Endangered Species Act (ESA) can result in significant and costly consequences for landowners, industry, government, and other entities—often with little if any evidence of a commensurate benefit to the species involved.").

Consider California's housing crisis. Working people are homeless. *See* Kateri Wozny, *Hope for California's Housing Crisis?*, U.S. News and World Report (April 3, 2018), https://www.usnews.com/news/best-states/articles/2018-04-03/is-there-hope-for-californias-housing-crisis. Multiple generations of a family share a single house. Unluckier families must share beds, garages, and even cars as their sleeping quarters. *See* Bryan Schatz, *California's Housing Crisis Is So Bad, Families Are Squatting Abandoned Homes Just to Survive*, Mother Jones (Mar./Apr. 2018), https://www.motherjones.com/crime-justice/2018/04/retake-the-house/. State and local politicians are working frantically to address the housing shortage in California. *See, generally*, California State Senate Majority Caucus, *Confronting California's Housing Crisis* (2018), http://focus.senate.ca.gov/housing#. Californians—companies and citizens alike—are leaving the state. *See* Conor Dougherty, *California Housing Problems Are Spilling Across Its Borders*, N.Y. Times, Mar. 20, 2018, at B1. The Service's ability to designate *actual* habitat already has taken land out of productive use, including for home-building purposes. Imagine how the power to designate

hypothetical habitat on land that is uninhabitable by any protected species will undermine efforts in California to provide housing to its residents. The harm to the average individual and family in desperate need of affordable housing in California and other states cannot be overstated.

II. HABITAT DESIGNATIONS AFFECT EVEN PROJECTS THAT DO NOT REQUIRE FEDERAL ACTION

In addition to the economic cost burdens described above, a "critical habitat" designation can impose regulatory burdens on a landowner even when a project requires no federal action. Specifically, land that has been designated as "critical habitat" can be used by state and local governments to justify significant limits on a property's use and development. For although ***federal law*** may not compel state and local governments to engage in Section 7 consultation with the Service or mandate project modification based on the existence of federally designated critical habitat, ***state and local laws*** can and do render such critical habitat relevant to (and often decisive in) the decision whether or the extent to which to allow a particular use.

The Service is well aware of the significant influence that its critical habitat designations have on state and local permit decision-making. That influence will only grow if the Service's designation power is expanded to the extent sanctioned by the Fifth Circuit in this case. *See, e.g.*, Dashiell Farewell, *Revitalizing Critical Habitat: The Ninth Circuit's Pro-Efficiency Approach*, 46 Envtl. L. 653, 663 (2016)

("With more parties on notice the more likely it is that habitat will receive the consideration and protection it deserves. . . . [A]gencies involved in restoration and conservation efforts will be more aware of areas worth their attention.").

We know the Service is aware of the effect of designation on local decision-making because the Service has recognized it in the past. California—one of the jurisdictions where state and local agencies regularly rely upon federally designated critical habitat to limit land use and development, even where there is no federal nexus—provides a number of examples.

In 2011, the Service proposed a rule designating critical habitat for the Sonoma County Distinct Population Segment of the California Tiger Salamander. Revised Proposed Rule for the Designation of Critical Habitat for the Sonoma County Distinct Population Segment of the California Tiger Salamander, 76 Fed. Reg. 2863 (Jan. 18, 2011). In analyzing the proposed rule's effect on small businesses, the Service recognized that, "even in the absence of a Federal nexus, indirect incremental impacts [on small businesses] may result if, for example, a city requests project modifications via the city's review under the California Environmental Quality Act (CEQA), due to the designation of critical habitat."[5] *Id.* at 2869.

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[5] CEQA is the California statute that requires state and local agencies to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts if feasible. *See* Cal. Pub. Res. Code § 21000 *et seq.*

Indeed, the report produced "to assist the Secretary of the Interior in determining whether the benefits of excluding particular areas from the designation outweigh the biological benefits of including them" found the designation was likely "to impose losses of over $336 million relating to lost development opportunities." *See* CRA International, *Economic Effects of Critical Habitat Designation for the California Tiger Salamander in Sonoma County* 1, 3 (Sept. 23, 2005). Those effects were expected to be concentrated in the real estate development sector, particularly where there are few alternative sites for development or housing is highly rationed. The report recognized that "[t]he welfare impacts of critical habitat designations are affected by the nature and extent of prior interventions such as zoning, urban growth boundaries and other policies." *See id.* at 23; *see also id.* at 25-26 (discussing the intersection between Clean Water Act requirements and the Santa Rosa Plain Conservation Strategy).

Another example comes from the California Coastal Commission, the state agency responsible for regulating and permitting land use and development along the California coast. *See* Cal. Pub. Res. Code § 30001.5; *Ross v. Cal. Coastal Comm'n*, 199 Cal. App. 4th 900, 923 (2011) (referring to the agency's governing statute, the Coastal Act, as "a comprehensive scheme to govern coastal land use planning for the entire state"). One of the Coastal Commission's strongest weapons against land use and development is the Coastal Act's concept of an "Environmentally Sensitive Habitat Area" ("ESHA"), which is defined as:

> any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

Cal. Pub. Res. Code § 30107.5.

Designation of property as "ESHA" is the death knell of almost any use or development of private property. That is because only so-called "resource-dependent uses" of property are allowed in an ESHA. *See id.* § 30240(a) ("Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.").

How precisely does the Coastal Commission go about deciding whether an area of land is an ESHA? It turns out that the California Coastal Commission assumes property is ESHA—and is therefore undevelopable—if it is or ever has been federally designated as critical habitat. For instance, when the Coastal Commission was reviewing a proposed development of a toll road in Southern California in what was then mostly undeveloped open space, it observed that some of that area was federally designated critical habitat. That was enough to declare the area an undevelopable ESHA and, partly on that basis, the Commission denied the project:

> [A]lthough the Commission is not limited to designated critical habitats

> when defining ESHA, the Commission can rely on critical habitat designations as one of the components supporting an ESHA determination.
>
> As detailed below, the Commission finds that those areas within the coastal zone portion of the proposed project area that are currently or have previously been specifically designated as critical habitat by the U.S. Fish and Wildlife Service (FWS) due to the recognized and established presence of federally listed threatened or endangered species and/or the importance of these areas to the conservation of threatened or endangered species also qualify as environmentally sensitive habitat areas, ESHA.

California Coastal Commission, Revised Staff Report and Recommendation on Consistency Certification, for Consistency Certification No. CC018-07 29 (Feb. 6, 2008) https://documents.coastal.ca.gov/reports/2008/2/W8b-2-2008.pdf.

In sum, the effect of a "critical habitat" designation is not limited to projects requiring federal action. The designation can also influence and, in some cases, influence the permit decisions of state and local agencies, to the detriment of developers, ranchers, business owners, foresters, and other property owners. The power to designate even non-habitat as "critical habitat" is the power to further

threaten and erode their ability to use their properties.

III. STATES, LOCAL GOVERNMENTS, AND THE PRIVATE SECTOR ARE PLAYING AN EVER-GROWING ROLE IN SPECIES CONSERVATION, MAKING IT UNNECESSARY—AND UNWISE—TO EXPAND THE SERVICE'S DESIGNATION POWER TO INCLUDE NON-HABITAT WITH NO NEXUS TO A LISTED SPECIES

The federal government's constitutionally limited role in species conservation does not leave endangered and threatened species unprotected. States are actually quite good at regulating land use in an effort to protect such species, including on private property. California has some of the most burdensome and extensive environmental regulations in the country. "The primary benefit for enhanced state responsibility in species conservation derives from sheer institutional presence and strength on the land where conservation action is needed." Kaush Arha and Barton H. "Buzz" Thompson, *Endangered Species Act and Federalism: Effective Species Conservation through Greater State Commitment* 9 (Woods Inst. for Environment, Stanford L. Sch. Policy Paper) https://woods.stanford.edu/sites/default/files/files/Endangered-Species-Act-Policy-Paper-20050224.pdf.

A chart of 2005 resources devoted to wildlife conservation in California demonstrates the State's presence and strength in that space:

	CA Fish & Game Dept.	USFWS	NOAA Fisheries
# of Game Wardens / Law Enf. Agents	350	20	14
# of Biologists*	886	168**	52
Total Wardens & Biologists	1,236	188	66
Total Budget for FY 2004	283,158,000	32,500,000***	29,920,000

* does not include state or federal biologists stationed at state or federal wildlife refuges or fish hatcheries as there job entails managing that parcel of land rather than working with entities outside the confines of the hatchery or wildlife refuge.
** the number refers to FWS biologists in both California & Nevada.
*** represents only the appropriated funds to Sacramento Office of FWS.

Id. at 11-12.

Indeed, "[g]iven the familiarity of state institutions with the ecological, economic, and social landscape of the state they are better positioned than the transient representatives of the federal government to design and implement species

conservation programs with better effect and at less cost." *Id.* at 12. That is not to say states are perfect. *See* Alejandro E. Camacho, Michael Robinson-Dorn, Asena Cansu Yildiz, and Tara Teegarden, *Assessing State Laws and Resources for Endangered Species Protection*, 47 Envtl. L. Rep. 10838 (Oct. 2017). But states like California—and regional bodies like the Western Governors' Association—can and do put significant resources toward species conservation. *See* Western Governors' Association, *Species Conservation and Endangered Species Act Initiative*, http://westgov.org/initiatives/species-conservation-and-esa. "[T]o reach the full potential of our species conservation efforts states agencies need to take the lead, as they did in game management, buttressed by federals laws and resources." Arha and Thompson at 15; *see also* John Copeland Nagle, *The Original Role of the States in the Endangered Species Act*, 53 Idaho L. Rev. 385, 388 (2017) ("The Congress that enacted the ESA in 1973 expected that states would play a lead in conservation efforts because the states already had substantially more wildlife management expertise than the federal government. The federal role, as the Department of the Interior testified at the time, was 'an overseeing operation' to ensure that states were fulfilling the purposes of the law.").

The private sector has in recent years begun playing an ever greater role in species conservation as well. The American Prairie Reserve, for example, combines "existing public lands with private resources and a businesslike approach to securing land." Pete Geddes, *The Yellowstone of the Future*, N.Y. Times, Dec. 28, 2015, at A19. The organization has raised "$100 million from private supporters to purchase 25

properties, which are now open to the public for camping, hiking, and hunting." Huggins, *supra*. American Prairie Reserve has reintroduced bison, converted existing fences to more migration-friendly boundaries, and incentivized neighboring farmers and ranchers to permit wandering wildlife to find a meal on their land.

The arc of environmental conservation in many states, like California, is bending toward greater state, local, and voluntary protection of threatened and endangered species. Affirming the Fifth Circuit and blessing the Service's unfettered ability to designate private land as critical habitat when that land is neither habitat nor critical threaten to undermine that trend and institute greater top-down controls that serve neither the States, its businesses and consumers, nor the resource-strapped federal Service.

CONCLUSION

For the reasons stated above, and those stated in the briefs of Petitioner and of Respondents Markle Interests, LLC, *et al.*, Amici urge the Court to reverse the Fifth Circuit's decision.

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Respectfully submitted,

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